Supreme Court, U. S.
FILED
OCT 3 1974
MICHAEL RODAK, JR.

73-1046

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 1046

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellant,

v.

SANTIAGO DIAZ, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of Florida

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BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR AS AMICUS CURIAE

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INTEREST OF THE AMICUS

Legal Services for the Elderly Poor is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly Poor has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly Poor has participated as co-counsel or amicus in numerous cases before this Court involving the elderly, including Graham v.

Richardson, 403 U.S. 365 (1971), Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 107 (1971), and Ortwein v. Schwab, 410 U.S. 656, reh. den., 411 U.S. 922 (1973).

All parties have consented to the filing of this amicus brief. Copies of the consents are annexed.

ARGUMENT

1. 42 U.S.C. §1395 o(2)(A)(ii)* VIOLATES THE EQUAL PROTECTION ELEMENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

a. Classifications Based on Alienage Are Inherently Suspect and Can Be Justified Only by a Compelling Governmental Interest

This Court has firmly established the principle that classifications based on alienage, like those based on nationality or race, are inherently suspect. Graham v. Richardson, 403 U.S. 365, 372 (1971) (entitlement to public assistance); In Re

* Note at end of brief.

Griffiths, 413 U.S. 717, 721 (1973) (bar membership); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (municipal employment). Cases have uniformly held that legislation based upon a suspect classification "bears a heavy burden of justification." McLaughlin v. Florida, 379 U.S. 184, 196 (1964). See also Loving v. Virginia, 388 U.S. 1, 11 (1967). To meet this burden, the States have been required to show that the legislation furthers a "compelling" (or similarly characterized) governmental interest. See In Re Griffiths, supra, at 722, n. 9, for a discussion of the essential identity of the terms used to describe the required governmental interest when legislation carving out a suspect classification is at issue. In Graham v. Richardson, supra, this Court clearly indicated that the compelling governmental interest test is the proper

test to apply when a classification is based on alienage:

> "Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro." [at 375]

Other courts have followed Graham v. Richardson in requiring a showing of a compelling governmental interest when a classification based on alienage is at issue. See, e.g., Faruki v. Rogers, 349 F. Supp. 723, 727 (D.D.C. 1972) (durational citizenship requirement for foreign service held invalid); Miranda v. Nelson, 351 F. Supp. 735, 739 (D. Ariz. 1972), aff'd mem., 413 U.S. 902 (1973) (discharge based on alienage); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (denial of municipal employment; also usurpation of exclusive Federal right to regulate immigration).

b. The Standards of Equal Protection Applicable to the States Through the Fourteenth Amendment Are Equally Applicable to the Federal Government Through the Fifth Amendment

It is well established that the due process clause of the Fifth Amendment contains equal protection standards to which the federal government must adhere. Bolling v. Sharpe, 347 U.S. 497 (1954); Harrow v. Washington, companion case to Shapiro v. Thompson, 394 U.S. 618 (1969), specifically so held. Various courts have interpreted the equal protection element of the due process clause of the Fifth Amendment as embodying the same standards as the equal protection clause of the Fourteenth Amendment for aliens as well as others. See, e.g., Nielsen v. Secretary of Treasury, 424 F.2d 833, 846 (D.C. Cir. 1970), where the court stated:

> "The courts stand ready to safeguard aliens against unreasonable discriminations, and to invoke the equal pro-

> tection clause of the Fourteenth Amendment as to actions by states, or the due process clause of the Fifth Amendment which provides equivalent safeguards against unreasonable action by the Federal Government."

Morris v. Richardson, 346 F. Supp. 494, 499 (N.D. Ga. 1972), stated the rule as follows:

> "All standards of equal protection applicable to the states through the Fourteenth Amendment are also applicable to the federal government through the Fifth Amendment. To rule otherwise would be totally illogical if not hypocritical."

It would, indeed, be illogical and hypocritical not to hold the federal government to the same standards of equal protection as are required of the state governments. Bolling v. Sharpe, supra, crystallizes this logic into compelling precedent. Although the justifications put forth by the federal government for its discriminatory actions may differ from those put forth by the states, there is no reason in logic or history why the

standards of equal protection should vary as between the federal government and the state governments, particularly when here, as in Graham v. Richardson, it is only benefits which are at stake. It is clear, therefore, that the statutory provision in question in this case, 42 U.S.C. §1395 o(2)(A)(ii), because it discriminates against aliens and thereby creates a suspect classification, must be held to be violative of Fifth Amendment's equal protection guarantee. The rationale is simple: "Aliens lawfully within this country have a right to reside in any of our states and may do so with assurance that the laws of this land will be applied to them on the same basis as they are applied to citizens." Mohamed v. Parks, supra, at 521.

c. The Alien Residency Requirement Does Not Promote a Compelling Governmental Interest, Nor Does It Even Serve a Rational Purpose

Appellant has put forth the justification that the alien residency requirement is necessary to insure the continued fiscal integrity of this supplemental benefits program. But, in directly and invidiously discriminating against aliens as a class, the alien residency requirement is not a constitutionally permissible method of attempting to insure fiscal integrity. Shapiro v. Thompson, supra, at 633: "The saving of welfare costs cannot be an independent ground for an invidious classification." Of course Graham v. Richardson, supra, and Sailer v. Leger, its companion case, jointly exclude this justification for an alien residency exclusion from benefits. See in particular 403 U.S. at 375.

Furthermore, as the court below found at 361 F. Supp. 12, the alien residency requirement is more likely to undermine than to promote the fiscal integrity of Medicare (Part B):

> "Thus, the residency requirement appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases."

If, as the appellant has asserted, another purpose of the alien residency requiements is to exclude certain "undeserving" aliens from participation in the supplemental medical insurance program, this residency requirement is a curious method for accomplishing such a purpose. First, as discussed more fully in Point II infra, the United States immigration laws, 8 U.S.C. §1101 et seq., already serve the purposes of regulating alien

entry into the United States and of excluding those aliens who might be considered "undeserving." It is as if one hand takes away what the other gives. The immigration laws define the individuals as "deserving," the Constitution here mandates their treatment as if they were citizens, and then suddenly Medicare (Part B) stigmatizes them as "undeserving."

Secondly, by excluding all aliens from participation in the Medicare (Part B) program for five years, and not just those aliens who prove "undeserving," the alien residency requirement creates a grossly overinclusive classification. It also creates an irrebuttable presumption that all aliens are "undeserving" of participation in this program for a period of five years. In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that an Illinois statute providing that children

of unmarried fathers, upon the death of the mother, are declared wards of the state without any hearing on parental fitness was violative of equal protection. Thus, the irrebuttable presumption of parental unfitness was struck down. This Court stated at 656-657 that proceeding by an irrebuttable presumption "is always cheaper and easier than individualized determination." But when, as here, "it needlessly risks running roughshod" over important individual interests, it cannot stand. The irrebuttable presumption of the "undeservedness" of all aliens for five years contained in the alien residency requirement works every bit as invidious a discrimination as does the irrebuttable presumption of the parental unfitness of unmarried fathers contained in the statute in Stanley. See, further on irrebuttable presumptions, Vlandis v.

Kline, 412 U.S. 441 (1973), and Cleveland Board of Education v. La Fleur, 39 L. Ed. 2d 52 (1974).

Finally, Medicare responds to categories of need, not to categories of moral judgment such as "undeserving" might define.

2. 42 U.S.C. §1395 o(2)(A)(ii) IS CONTRARY TO THE MANDATE OF 42 U.S.C. §1981 AND IS UNNECESSARY IN LIGHT OF THIS COUNTRY'S CAREFULLY DESIGNED IMMIGRATION LAWS

Title 42, section 1395 o(2)(A)(ii), of the United States Code, discriminates against a large group of aliens lawfully residing in this country. Such discrimination on the basis of alienage clearly contradicts 42 U.S.C. §1981, both as written and as interpreted. This section, which is entitled "Equal Rights Under the Law," provides in its relevant part that:

"All persons within the jurisdiction of the United States shall have the same rights...to the full and equal

benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

It is long and well established that the "all persons" referred to in §1981 includes aliens. Yick Wo v. Hopkins, 118 U.S. 221 (1886), and Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948). Thus, it is impossible to reconcile the language of §1981 with the effect of §1395 o(2)(A)(ii), which is to deny medical care to a large group of people solely upon the basis of their status as aliens. The very purpose of §1981, and the national policy that it represents, are both ignored and undermined by §1395 o(2)(A)(ii). In discussing §1981 in Takahashi v. Fish and Game Commission, supra, this Court stated at 420:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

This conclusion is well supported by the legislative history of §1981, for the term "all persons" was substituted for "all citizens" when the original 1866 legislation was amended in 1870. For a thorough discussion of the history and purpose of this section, see further, Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 533-536 (S.D. Tex. 1972).

Thus §1395 o(2)(A)(ii) stands in contradiction to the national policy espoused in §1981. Furthermore, it does so totally unnecessarily. As was discussed in Point 1-c, concern for the national fisc cannot justify the type of discrimination present here. Neither can §1395 o(2)(A)(ii) stand as a justifiable means for withholding the benefits of Medicare (Part B) from undeserving aliens. Not only is the statute overbroad for this purpose; it is also misplaced in time and location. The immigration laws of this country, found in

Title 8, Chapter 12, of the United States Code, are quite adequately designed to prevent any influx of aliens coming to this country solely to receive various public welfare benefits. 8 U.S.C. §1182 (a)(15) provides that any alien can be denied admission to the United States if he is likely at any time to become a public charge. Furthermore, an alien can be deported if within five years after his entry into this country he becomes a public charge for reasons not affirmatively shown to have arisen after his entry (8 U.S.C. §1251 (a)(8)).[1] Certainly, these provisions more than adequately protect against a wholesale invasion of the United States by aliens who seek nothing but public welfare benefits. Therefore, 42 U.S.C. §1395 o(2)(A)(ii) is an unnecessary, as well as overbroad, provision. It is in

1. While it is true that some aliens may be paroled into the country without meeting the normal admissions standards (§1182 (d)(5)), such parolees may apply for perma-

fact a sad commentary on the state of this country's self-image if laws must be drafted on the premise that aliens no longer come to our shores seeking equality and opportunity, but only a woefully small welfare check. The immigration laws and department were established to deal with immigrants, aliens, and naturalization. The Medicare law was established to help the impoverished with their medical expenses. Nothing in its nature, history or purpose can justify its incursion into the field of immigration; and by excluding needy aliens it frustrates rather than furthers the purpose of the statutory scheme.

(1.con't) nent residence status after two years (80 Stat. 1161 (1966) amending 8 U.S.C. 1255(c)(1964)), at which time they must presumably meet the normal admissions standards.

3. 42 U.S.C. §1395 o(2)(A)(ii) IS CONTRARY TO THE INTERNATIONAL POLICY OF THE UNITED STATES EXPRESSED IN ITS TREATIES WITH THE UNITED NATIONS AND THE ORGANIZATION OF AMERICAN STATES

Following World War Two, this nation, in concert with many others, became signatory to the United Nations Charter, 59 Stat. 1031. Chapter 1, Article 1, Subparagraph (2) of that charter states in part:

> "The purposes of the United Nations are:...
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."

Further, our country is signatory to the Charter of the Organization of American States, 2 U.S.T. 2394 (1951), which provides in relevant part:

Chapter VII

Social Standards

Article 28

> The Member States agree to cooperate with one another to achieve just and decent living conditions for their

entire populations.

Article 29

> The Member States agree upon the desirability of developing their social legislation on the following bases:
> a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security;
> b) Work is a right and a social duty; it shall not be considered as an article of commerce; it demands respect for freedom of association and for the dignity of the worker; and it is to be performed under conditions that ensure life, health and a decent standard of living, both during old age, or when any circumstance deprives the individual of the possibility of working.

Certainly §1395 o(2)(A)(ii) is inconsistent with the principles expressed in the above charters. And the effect of those principles on our national policies should not be taken lightly. As Justices Black and Douglas stated in a concurring opinion in Oyama v. California, 332 U.S. 632, 649-50 (1948):

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote...univeral respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

The very same question might well be asked with respect to discriminatory federal laws, for they represent a far broader manifestation of infidelity to our international pledges. The same party to the treaty promulgates actions counter to it.

Thus, invalidation of 42 U.S.C. §1395 o(2)(A)(ii) would strengthen our relationship with all foreign nations, improve our image in the weaker countries, especially those of Latin America, and reinforce the meaning of the inscription

on the pedestal of the Statue of Liberty:

> "Give me your tired, your poor,
> Your huddled masses yearning to be free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me.
> I lift my lamp beside the golden door!"
>
> --Emma Lazarus

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: September 30, 1974

Respectfully submitted,

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* This section is substantially the same as the present §1395 o(2)(B) which replaced this section October 30, 1972. The law suit was commenced prior to that date.